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No. _____

In The

Supreme Court of the United States

October Term, 1989

STATE OF CONNECTICUT,

Petitioner

v.

MICHAEL D'AMBROSIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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QUESTIONS PRESENTED

1. Does the Sixth Amendment right of confrontation entitle a defendant in a criminal prosecution to discover privileged information about a state's witness in order to enhance the effectiveness of his cross-examination, contrary to the plurality opinion of this Court in *Pennsylvania v. Ritchie*?

2. Where an unqualified statutory privilege protects information about a state's witness, what burden of proof must a criminal defendant sustain in order to establish the constitutional necessity for limited disclosure through *voir dire* of the witness or an *in camera* inspection?

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STATE OF CONNECTICUT,

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v.

MICHAEL D'AMBROSIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut, entered in this proceeding on July 4, 1989.

OPINION BELOW

The opinion of the Supreme Court of Connecticut is reported at 212 Conn. 50, 561 A.2d 422 and is reprinted in the appendix, p. A1, *infra*. The decision of the Connecticut Appellate Court is reported at 14 Conn. App. 309, 541

A.2d 880 (1988) and is also reprinted in the appendix, p. A16, *infra*.

JURISDICTION

The decision of the Connecticut Supreme Court reversing the judgment of conviction was issued July 4, 1989; the order denying the timely motion for reargument was entered on September 27, 1989. Copies of both orders appear in the appendix, pp. A39, A40, *infra*. The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. §157(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATUTORY PROVISIONS INVOLVED

1. Connecticut's patient-psychiatrist privilege is set forth at Connecticut General Statutes Section 52-146(d) through (i). It provides, in pertinent part:

> [Section 52-146d(2)]. "Communications and records" means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervison of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility.
>
> [Section 52-146e(a)]. All communications and records as defined in section 52-146d, shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part of any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

2. Connecticut's alcoholism treatment privilege is set forth at Connecticut General Statutes Section 17-155bb and provides in pertinent part:

> (b) The commission shall not permit the disclosure of the identity, diagnosis, prognosis or treatment of any such patient which would constitute a violation of federal statutes concerning confidentiality of alcohol or drug patient records and any regulations pursuant thereto, or as they may be amended from time to time; and

shall adopt regulations to protect the confidentiality of information obtained by it.[1]

STATEMENT OF THE CASE

A. State Court Proceedings

Respondent Michael D'Ambrosia was convicted after a jury trial in the Connecticut Superior Court of burglary in the third degree, conspiracy to commit burglary in the third degree, criminal attempt to commit assault in the first degree and larceny in the sixth degree. He was sentenced to a term of twenty-three years and ninety days and five years of probation.

Albert Knous was a key witness for the state at the respondent's trial. Knous testified that, on October 29, 1985, the respondent approached him to tell him, that earlier that day, he and another man had broken into the victim's garage, severed the brake lines of her car and taken a tool box. According to Knous, the respondent then proposed that the two of them return to the victim's house, steal a television set and divide the proceeds. After the two men proceeded to the house, Knous entered alone while the respondent remained in the car. Knous fled without taking anything when he heard a car come up the victim's driveway. *See State v. D'Ambrosia*, 212 Conn. at 52-53, 561 A.2d at 423-24.

The respondent appealed to the Connecticut Appellate Court, claiming, *inter alia*, that his right of

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[1] The two applicable statutory privileges are set forth in their entirety in the attached Appendix.

confrontation was violated by the trial court's refusal to conduct an *in camera* inspection of privileged alcoholism treatment records relating to Knous.[2] The Appellate Court rejected this claim and affirmed respondent's convictions. The Connecticut Supreme Court subsequently certified the following issue for review: "Did the Appellate Court err in upholding the trial court's denial of the defendant's request for an examination of the psychiatric records of a key state's witness, on the basis that there had been no preliminary showing that denial was likely to impair his right to confrontation?" *See State v. Esposito*, 192 Conn. 166, 179-80, 471 A.2d 949 (1984).[3]

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[2] These records are protected from disclosure by both the patient-psychiatrist privilege; General Statutes §52-146(d)-(i); and the alcoholism treatment privilege; General Statutes §17-155bb.

[3] In *State v. Esposito*, 192 Conn. 166, 471 A.2d 949 (1984), the Connecticut Supreme Court ruled that the sixth amendment requires an *in camera* inspection of privileged psychiatric records if the defendant makes a preliminary showing of "reasonable grounds to believe that failure to produce the information is likely to impair the defendant's right of confrontation, such that the witness's direct testimony should be stricken." 192 Conn. at 179-80, 471 A.2d at 956.

With some modifications; *see State v. Hufford*, 205 Conn. 386, 404-05, 533 A.2d 866 (1987); *State v. Pierson*, 201 Conn. 211, 227, 514 A.2d 724 (1986); *Esposito* has continued to govern cases in which claims of access to privileged records are made. *State v. Kelly*, 208 Conn. 365, 545 A.2d 1048 (1988); *State v. Burak*, 201 Conn. 517, 518 A.2d 639 (1986); *State v. Bruno*, 197 Conn. 326, 497 A.2d 758 (1985), *cert. denied*, 475 U.S. 1119 (1986).

The Connecticut Supreme Court reversed respondent's convictions on the ground that the trial court denied respondent a fair opportunity to establish the threshold showing for an *in camera* inspection by sustaining the state's objections to questions which sought to elicit privileged information. It remanded to the trial court with instructions to reopen the preliminary *voir dire*.[4]

B. Facts Pertinent To Disclosure Of Privileged Information

At the conclusion of Knous's direct testimony, and before beginning cross-examination, defense counsel requested an opportunity to make the preliminary showing for an *in camera* inspection of the records. Out of the presence of the jury, Knous then testified that, in August, 1985, as a condition of probation imposed upon by the court for an unrelated burglary, he had attended a 28-day alcoholism treatment program at a state hospital. He stated he had begun drinking heavily in 1983 and had continued to do so until his admission to the state hospital. The alcoholism program was Knous's only hospital admission related to mental health; he was treated by a psychiatrist there and participated in individual and group therapy sessions. Knous also acknowledged that he

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[4] The posture of this case is thus very similar to that of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). There, the Pennsylvania Supreme Court had sustained the defendant's confrontation claim and remanded for further proceedings. A majority of this Court concluded that the writ of certiorari was not barred by the lack of a final judgment. 480 U.S. at 47-50.

had been drinking on the day of the burglary before joining the respondent, although he was unable to say whether he had been drinking excessively.

During the offer of proof, defense counsel also sought to elicit from Knous certain information covered by the applicable privileges, specifically: (1) the diagnosis of his mental problem, (2) whether he had been treated for any type of mental illness other than alcoholism, such as schizophrenia or depression and (3) why the treating professionals at the state hospital advised him to enter a half-way house. The trial court sustained the state's objections to these questions, accepting the prosecutor's argument that the preliminary showing for an *in camera* inspection must be established without invading an applicable privilege.

Respondent claimed that the preliminary showing was established, despite the limitations imposed during *voir dire*. He argued that the privileged material should be examined by the trial court in order to determine the effects of alcohol on Knous and whether there is a syndrome connected with alcohol abuse which would bear adversely on his competency or credibility. Respondent presented no other witnesses in support of the preliminary showing.

C. Summary Of Lower Court Decisions

The trial court ruled that the respondent was not entitled to review the records himself or to have an *in camera* inspection performed by the court. The court did permit the respondent to question Knous, in the presence of the jury, about his alcoholism, his drinking on the day

in question and the possible effects of alcohol on his sensory capacity and memory.

The Connecticut Appellate Court affirmed, expressly relying on this Court's plurality opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The court applied the principle that the right of confrontation is a *trial* right which does not include the power to require pretrial disclosure of privileged information that might be useful to the defense. *State v. D'Ambrosia*, 14 Conn. App. 309, 316, 541 A.2d 880, 884, *citing Pennsylvania v. Ritchie, supra* at 52. It found that, with respect to the alcoholism treatment records at issue, the respondent had failed to establish the preliminary showing for an *in camera* inspection, either as defined by the Connecticut Supreme Court, in terms of the likely impairment of the right of confrontation, or, as formulated in the *Ritchie* plurality opinion, a plausible showing that the records contain information that is favorable and material in the due process-*Brady* sense. *Brady v. Maryland*, 373 U.S. 83 (1963). *See* 14 Conn. App. at 316-17, 541 A.2d at 884, *citing Ritchie, supra* at 58, and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

The Connecticut Supreme Court reversed. Relying on *Davis v. Alaska*, 415 U.S. 308 (1974) and other confrontation clause precedents, the court held that, although defense counsel had failed to establish the threshold showing for an *in camera* inspection, the trial court erred in precluding the respondent from exploring privileged topics during the preliminary *voir dire*. It ruled that, if, on remand, Knous does not agree to waive the applicable

privileges, his direct testimony must be stricken. To justify its ruling that Knous must reveal privileged information before a preliminary showing is established, the court expressed the view that defense counsel must be allowed some latitude during the preliminary showing because it is impossible for counsel to establish that the privileged information includes non-cumulative impeachment evidence without some access to it. The court also indicated that the scope of *voir dire* into privileged topics is within the discretion of the trial court.[5]

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[5] The respondent presented his claim to the court below on state as well as federal constitutional grounds. The Connecticut court indicated briefly that a state constitutional analysis would not lead to a different result in this case and declined to separately address the issue on state law grounds. 212 Conn. at 57 n.5, 501 A.2d at 426. The Court cited sixth amendment decisions of this Court to support its view of the right of confrontation as the basis for access to privileged records. 212 Conn. at 57, 561 A.2d at 426, *citing Davis v. Alaska*, 415 U.S. 308 (1974); *Delaware v. Fensterer*, 474 U.S. 15 (1985); and *Ohio v. Roberts*, 448 U.S. 56 (1980). No statement that the decision rests on independent state grounds appears in the opinion. Accordingly, this Court has jurisdiction to review the decision. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

REASONS FOR GRANTING THE PETITION

I. THE JUDGMENT OF THE CONNECTICUT SUPREME COURT, WHICH HOLDS THAT THE SIXTH AMENDMENT RIGHT OF CONFRONTATION GIVES A CRIMINAL DEFENDANT A RIGHT OF ACCESS TO PRIVILEGED INFORMATION, CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT AND OTHER STATE COURTS AND RAISES AN IMPORTANT, RECURRING, AND UNRESOLVED QUESTION WORTHY OF CERTIORARI REVIEW

A. The Opinion Of The Connecticut Supreme Court Conflicts With The Plurality Opinion In *Pennsylvania v. Ritchie* And With Other Sixth Amendment Decisions Of This Court

The analysis of the Connecticut Supreme Court conflicts directly with the plurality opinion in *Pennsylvania v. Ritchie, supra,* which states that the disclosure of privileged material in the context of a criminal trial is governed by the due process clause and *Brady v. Maryland,* 373 U.S. 83 (1963), rather than the confrontation clause, as interpreted in *Davis v. Alaska, supra.*

The statutory privileges at issue in this case, like that considered in *Ritchie,* are distinct from the direct statutory restriction on cross-examination found to violate the confrontation clause in *Davis, supra.* The statute and court rule in question in that case did not prevent defense counsel from learning of the existence of the witness's juvenile record, nor from examining its contents. However, by prohibiting admission of the record in court, they precluded counsel from questioning the witness about an essential fact probative of bias, that is, the witness's probationary status.

In contrast, the statutory privileges at issue here and in *Ritchie* protect certain information from disclosure generally. They do not directly restrict the scope of cross-examination or declare psychiatric evidence inadmissible. Rather, they prevent counsel from learning certain information that could, potentially, make cross-examination more effective. The confrontation clause, however, does not guarantee a cross-examination that is "effective in whatever way and to whatever extent the defense may wish." *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985).

The distinction between discovery of useful information by the defense and the right of cross-examination was not drawn for the first time by the *Ritchie* plurality. In *United States v. Bagley*, 473 U.S. 667 (1985), a majority of this Court agreed that the Court of Appeals erred in applying *Davis v. Alaska*, *supra* to the prosecution's suppression of the fact that government witnesses had been promised payment for supplying information. Since defense counsel's inability to question the witnesses about the promise was attributable to lack of knowledge rather than to a direct statutory or court-imposed prohibition, a *Brady* issue was presented rather than a confrontation clause question. 473 U.S. at 677-78.

The distinction applied by the *Ritchie* plurality finds further support in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). As in *Bagley*, the impeachment evidence in question concerned a deal between the prosecution and a government witness. However, unlike *Bagley*, the facts were fully disclosed. Instead, it was the trial judge that wholly prevented counsel from using the information during cross-examination. The *Ritchie* plurality classified this ruling as a classic confrontation clause violation: "a

specific statutory or court-imposed restriction at trial on the scope of questioning." *Ritchie, supra* at 54 and n.10.

The two privileges applicable in this case prevent counsel from learning certain information, but they do not directly restrict cross-examination. Accordingly, the Connecticut Supreme Court's reliance on *Davis v. Alaska* and the confrontation clause to permit discovery of privileged information misconstrues the essential nature of the right of cross-examination. Moreover, it opens the way toward a sixth amendment doctrine of discovery in criminal cases. The petition for certiorari should be granted in order that this Court might conclusively define the constitutional basis for respondent's discovery of privileged impeachment evidence. *Ritchie, supra; Bagley, supra.*[6]

B. State Court Decisions Are In Conflict As To Both The Constitutional Basis For Disclosure Of Privileged Materials And The Degree Of Disclosure Required

The plurality opinion in *Ritchie* has been subjected to varying and inconsistent interpretations in the state

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[6] Even if the confrontation clause was properly applied by the Connecticut Supreme Court, it misinterpreted the holding in *Davis v. Alaska*, 415 U.S. 308 (1974). The trial court ruled that counsel could explore Knous's alcoholism and consumption of alcohol on the pertinent day during cross-examination, thus placing the essential issue of his sensory reliability before the jury. Therefore, the constitutional minimum was satisfied and the trial court's denial of defense counsel's request for an *in camera* inspection of Knous's alcoholism treatment records was a permissible exercise of its discretion to limit the scope of cross-examination.

courts. While some state courts have adopted its due process analysis, *State v. Percy*, 149 Vt. 623, 548 A.2d 408 (1988); *United States v. Johnson*, 537 A.2d 555 (D.C. 1988); at least one court in addition to that of Connecticut continues to view the issue of access to privileged material as governed by the confrontation clause. *State v. Kelly*, 554 A.2d 632 (R.I. 1989). Several courts have either declined to identify the constitutional basis for such access or analyzed such claims under both the confrontation and due process clauses. *People v. Foggy*, 121 Ill.2d 337, 118 Ill. Dec. 18, 521 N.E.2d 86 (1988), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2044 (1988); *State v. Perry*, 552 A.2d 545 (Me. 1989); *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987).

Those states that apply a confrontation analysis have done so with wholly inconsistent results. Prior to *Ritchie*, the Colorado Supreme Court ruled in broad terms that the confrontation clause cannot overcome the state's interest in confidentiality and that the only basis for disclosure of privileged material is waiver by the witness. *People v. District Court*, 719 P.2d 722, 723-27 (Colo. 1986). In striking contrast, the Rhode Island Supreme Court ruled that the right of confrontation automatically requires an *in camera* inspection of privileged materials relating to a state's witness. *State v. Kelly, supra*.

There is also inconsistency in the state courts as to whether the constitution requires an *in camera* inspection in every case, or whether defense counsel must first establish a threshold showing of necessity. *See State v. Paradee, supra* (no reference to showing); *State v. Perry, supra* (same); *People v. Foggy, supra* (showing required); *Comm. v. Jones*, 404 Mass. 339, 535 N.E.2d 221, 224 (1989) (same); *State v. Percy, supra* (same).

The Connecticut Supreme Court's confrontation analysis has shaped its definition of the requisite preliminary showing: the defendant must demonstrate reasonable grounds to believe that failure to produce the records is likely to impair the right of confrontation. *State v. D'Ambrosia*, 212 Conn. at 58, 561 A.2d at 426, *citing State v. Esposito, supra*. This test is wholly misguided in that, as discussed above, the confrontation clause does not govern the disclosure of privileged records.

Certiorari review of this case would, it is hoped, resolve a lingering, fundamental doubt as to the nature of a constitutional right of access to privileged information, and, in doing so, provide guidance to state courts and lead to more consistent interpretations of the United States Constitution.

II. WHETHER OR NOT THE RIGHT OF CONFRONTATION GOVERNS DISCOVERY OF PRIVILEGED INFORMATION, STATE COURTS ARE IN NEED OF SPECIFIC GUIDANCE IN DETERMINING WHEN AND TO WHAT EXTENT THE CONSTITUTION REQUIRES DISCLOSURE OF IMPEACHMENT EVIDENCE THAT IS PROTECTED BY AN UNQUALIFIED STATUTORY PRIVILEGE

Despite lack of agreement among the Justices of this Court as to whether a criminal defendant's right of access to privileged material stems from the right of confrontation or due process, a majority of this Court agrees that a defendant is entitled to an opportunity to demonstrate the constitutional necessity for an *in camera* inspection. *Pennsylvania v. Ritchie*, 480 U.S. 61 and 65 (Blackmun J., concurring). It remains unclear, however, specifically

when a defendant has satisfied this burden and how he may do so.

Although, in this case, the Connecticut Supreme Court found that the respondent failed to demonstrate the necessity for an *in camera* inspection, it ruled that Knous must reveal privileged information during the *voir dire* in order to afford counsel a fair opportunity to do so. In effect, it held that, immediately after direct examination, without even a minimal showing of necessity, a state's witness must either reveal confidential information about his mental health history, or have his direct testimony stricken. *See State v. D'Ambrosia*, 212 Conn. at 62-63; 561 A.2d at 428. Other than broad references to the right of cross-examination, the Connecticut court failed to offer any constitutional analysis to support this result.

In Connecticut's view, this ruling accomplishes substantial harm to the state's interest in law enforcement because it increases the frequency with which prosecutions will be terminated as a result of the striking of testimony following witnesses' refusal to consent to a *voir dire* into privileged topics. The decision is equally harmful to the state's interest in fostering therapeutic relationships.[7] Indeed, in requiring the witness to disclose

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[7] The privileges applicable in this case are intended to foster the trust of mental health or alcoholism patients in their physicians and other treating professionals. Such trust is regarded as critical to the creation of therapeutic relationships and the ultimate success of treatment. It cannot develop without a credible guarantee that communications made in the course of such treatment will remain absolutely confidential.

(Continued on following page)

confidential matters in the presence of trial counsel and other courtroom personnel as well as the trial judge, the ruling is more harmful to the state's interest in confidentiality than an *in camera* inspection would have been.

In ruling that an *in camera* inspection was the appropriate means of balancing the competing interests of the commonwealth and the respondent in *Pennsylvania v. Ritchie*, the plurality expressly reserved opinion as to whether the same result would be reached in a case where the applicable statute does not provide for disclosure to a court. 480 U.S at 57, n.14. Neither of the statutory privileges at issue in this case contains such an exception.[8]

This Court has suggested that the disclosure of privileged material is governed by the process of weighing the relative strength and specificity of the interests asserted

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See e.g., Whyte v. Conn. Mutual Life Ins., 818 F.2d 1005, 1010 (1st Cir. 1987); *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955); *State v. Storlazzi*, 191 Conn. 453, 458, 464 A.2d 829, 833 (1983).

[8] While the patient-psychiatrist privilege is subject to certain statutory exceptions; Connecticut General Statutes §§52-146(f)-(h); none permits the disclosure of the psychiatric history of a state's witness in a criminal trial.

Connecticut's alcoholism treatment privilege incorporates the provisions of the federal Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. 290dd-3 and regulations adopted pursuant thereto. 42 C.F.R. 2.63-2.64 (1985). These regulations provide for court-ordered disclosure of treatment records in certain situations not applicable in this case. *See id.*

by each party. *United States v. Nixon*, 418 U.S. 683, 707-08, 712, 714 (1974). An appellate court reviewing the denial of disclosure of privileged information should, at a minimum, consider the degree of disclosure authorized by the legislature and the availability of similar, non-privileged impeachment evidence. These factors should be weighed against the specificity of the evidence sought by the defense and the likelihood that such evidence is to be found in the privileged materials.

The Connecticut Supreme Court erred in requiring disclosure of confidential information without properly balancing the state's interests in non-disclosure against the respondent's interest in impeaching Knous. It accorded insufficient weight to the unqualified nature of the two applicable privileges and the trial court's ruling that respondent could cross-examine Knous concerning his alcoholism and his consumption of beer on the day in question. In this respect, its decision conflicts with those of other state courts. *People v. Foggy*, 121 Ill.2d 337, 118 Ill. Dec. 18, 521 N.E.2d 86 (1988), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2044 (1988); *Comm. v. Two Juveniles*, 397 Mass. 261, 269, 491 N.E.2d 234, 238-239 (1986).[9]

The Connecticut Supreme Court also erroneously concluded that, without the opportunity to question Knous about privileged communications during a preliminary *voir dire*, it would be "impossible for [him] to lay

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[9] Some state courts understand *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) to require an *in camera* inspection regardless of whether the statute contains an exception providing for it. *State v. Perry*, 552 A.2d 545 (Me. 1989); *State v. Paradee*, 403 N.W. 640 (Minn. 1987); *State v. Kelly*, 554 A.2d 632 (R.I. 1989).

the groundwork" for an *in camera* inspection. 212 Conn. at 61; 561 A.2d at 428. The burden of making a preliminary showing does not require the party to demonstrate conclusively what the records contain, but rather a reasonable or plausible basis for believing they contain significant impeachment evidence. *Pennsylvania v. Ritchie*, 480 U.S. at 58, n.15, *citing United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982). Where counsel is required to demonstrate materiality, his lack of access to the evidence in question may justify a relaxation of the degree of specificity required, but it does not relieve him of the burden of making a threshold showing. *United States v. Valenzuela-Bernal, supra* at 871; *United States v. Nixon, supra* at 701. *Accord, People v. Foggy, supra* at 91-92. *But see id.* at 96 (Simon, J., dissenting).

In this case, the respondent could have produced a lay witness with knowledge of whether Knous, when intoxicated, was likely to suffer hallucinations, delusions or memory blackouts. It would also have been a simple matter to produce a member of the hospital's staff with knowledge of whether information about the effects of alcohol on patients' sensory abilities or memory is collected and recorded. The trial court would then have had a much stronger and less speculative basis for determining the likelihood that the records contained material impeachment evidence. It was therefore not necessary for the privileges to yield in order to afford counsel a fair opportunity to make the threshold showing. *United States v. Valenzuela-Bernal, supra* at 871-872.

By reaching a disposition that conflicts with decisions of this Court and other states, the Connecticut Supreme Court has struck an unfair and unprecedented balance that is more favorable to the defense than is constitutionally necessary. Certiorari review of this case

would clarify the constitutional limits on legislative authority to protect therapeutic communications and thereby accord the two privileges their fullest permissible application.

CONCLUSION

This Court's review of the erroneous decision of the Connecticut Supreme Court would resolve the question of whether the right of confrontation or due process governs discovery of privileged information in criminal cases. In addition, the circumstances that constitutionally mandate the disclosure of privileged impeachment evidence pertaining to state's witnesses should be more specifically defined. For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

THE STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* MICHAEL D'AMBROSIA
(13507)

PETERS, C.J., SHEA, CALLAHAN, GLASS AND COVELLO, JS.

Amended information charging the defendant with the crimes of burglary in the first degree, burglary in the third degree, conspiracy to commit burglary in the third degree, attempted assault in the first degree, carrying a weapon in the motor vehicle and larceny in the sixth degree, brought to the Superior Court in the judicial district of New Haven, where the court, *McKeever, J.*, granted the defendant's motion for acquittal as to the first count; thereafter the matter was tried to the jury; verdict and judgment of guilty of burglary in the third degree, attempted assault in the first degree and larceny in the sixth degree, from which the defendant appealed to the Appellate Court, *Borden, Daly and O'Connell, Js.*, which affirmed the trial court's decision, and the defendant, on the granting of certification, appealed to this court. *Reversed; further proceedings.*

Susan M. Hankins, assistant public defender, for the appellant (defendant).

Carolyn K. Longstreth, deputy assistant state's attorney, with whom, on the brief, were *Michael Dearington*, state's attorney, and *Patrick Clifford*, assistant state's attorney, for the appellee (state).

PETERS, C.J. This appeal requires an examination of the scope of a defendant's obligation to make a preliminary showing of the materiality of a witness' psychiatric records for the purpose of cross-examination. A jury convicted the defendant of burglary in the third degree, conspiracy to commit burglary in the third degree,

attempted assault in the first degree and larceny in the sixth degree. General Statutes §§ 53a-103(a), 53a-48(a), 53a-49(a), 53a-59(a)(1), 53a-125b. The defendant appealed to the Appellate Court from the trial court's judgment, raising four claims of error. The Appellate Court found no error in the trial court's judgment; *State v. D'Ambrosia*, 14 Conn. App. 309, 541 A.2d 880 (1988); and we granted certification limited to the following issue: "Did the Appellate Court err in upholding the trial court's denial of the defendant's request for an examination of the psychiatric records of a key state witness, on the basis that there had been no preliminary showing that denial was likely to impair his right to confrontation?" *State v. D'Ambrosia*, 209 Conn. 802, 548 A.2d 439 (1988). We now reverse.

The jury could reasonably have found the following facts. On October 29, 1985, the complainant, a seventy-nine year old Guilford woman, discovered that the rear door to her house had been smashed. One of the complainant's neighbors told police that she had seen a heavy set white male in dark clothing, later identified as Albert Knous, run down the driveway and enter a dark colored car with a white top. Approximately forty-five minutes later, police officer spotted the defendant and Knous in a car matching the neighbor's description. *State v. D'Ambrosia*, supra, 14 Conn. App. 310-11. After further investigation linking both the defendant and Knous to the incident, the police charged the defendant with burglary, conspiracy to commit burglary in the third degree, attempted assault in the first degree, carrying a weapon in a motor vehicle and larceny in the sixth degree.

At the defendant's trial, Knous testified for the state that he was picking apples on the day of the incident when the defendant approached him to tell him he had broken into the complainant's home, that a companion had cut the brake lines to the car stored in the garage[1] and that the defendant had stolen a metal tool box. Knous also stated that the defendant reported having seen a television set in the house, which he wanted Knous to help him steal so that they could sell it and divide the proceeds. Knous testified that the pair then went to the house and he entered through the rear door, which he claimed had been smashed previously. He then searched the house for valuables, looked in the medicine cabinet for drugs and left without taking anything when he heard a car in the driveway. Id., 312.

Prior to cross-examination and outside the jury's presence, defense counsel questioned Knous about his treatment for alcoholism at Connecticut Valley Hospital. Knous stated that, as a condition of his probation stemming from previous charges, he had been admitted to a twenty-eight day alcohol program. He admitted he had been drinking heavily for two years prior to entering the alcohol program and had occasionally used other drugs. He also admitted he had been drinking on the day of the

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[1] The defendant and the complainant had been involved in an auto accident the previous day and the defendant had damaged his car extensively. According to Knous, the defendant seemed upset that his insurance would not cover his damages and apparently intended the burglary as retribution.

incident. Defense counsel inquired whether he had been drinking excessively that day, to which Knous answered, "I had been drinking. Excessive, I don't know." Id., 316.

Defense counsel then asked Knous a series of questions regarding his diagnosis, the psychiatric reasons for his hospitalization and the reasons why the program directors had recommended that he enter a halfway house.[2] The trial court sustained all of the state's

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[2] The transcript of defense counsel's questioning of Knous reads, in relevant part:

"Q. Did you get a diagnosis as a result of your stay at Connecticut Valley Hospital?

"A. Diagnosis?

"Q. Did they tell you what was wrong with you, if anything?

"A. They didn't tell me. I told-

"Mr. Clifford: I would object because it might get into this privileged area, your Honor, whether he had seen a psychiatrist. There is a privilege involved here. Counsel can't put on a showing by violating the psychiatric/client privilege. The showing has to be independent of that. Asking the questions is just the same as opening up that envelope and all of us going into the records. So I would object to that.

"The Court: Sustained.

* * *

"Q. Are there any psychiatric reasons for your hospitalization, such as schizophrenia, depression, anything along those lines which you are aware of?

"A. No.

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objections to these questions on the ground of the witness' psychiatric privilege. The defendant then requested access to Knous' psychiatric records or, alternatively, that the court inspect the records in camera to determine if they contained any impeaching material. The court denied the defendant access to the records and declined to examine them itself, concluding that counsel had failed to make a preliminary showing that the failure to inspect the records would deny the defendant his right to confrontation.

After the trial court rendered judgment on his convictions, the defendant appealed to the Appellate Court arguing that the trial court had violated his sixth amendment right to confrontation by precluding him from cross-examining the state's key witness on facts highly probative of the witness' credibility, capacity to perceive

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"Mr. Clifford: I would object. Again, it sounds like we are in a privileged area. I don't know if we are asking him if he is apparently schizophrenic.

I think we are.

"The Court: Anyway I found the question objectionable. I am going to sustain the objection.

* * *

"A. They offered me an opportunity to go into a Halfway House; I turned it down.

"Q. And why did they feel a Halfway House would be beneficial to you, if you know?

"Mr. Clifford: I would object, your Honor.

"The Court: Sustained."

and ability to recall facts.[3] The Appellate Court found no error in the trial court's ruling, holding that the court had provided the defendant wide latitude in cross-examining Knous and that the defendant had failed to make the necessary preliminary showing that the failure to produce the records would likely impair his constitutional right to confrontation. Id., 317. This appeal ensued.

The people of this state enjoy a broad privilege in the confidentiality of their psychiatric communications and records, including those pertaining to their diagnosis, prognosis or treatment for alcohol abuse of alcoholism. See General Statutes §§ 17-155bb(b), 52-146d, 52-146e.[4] A

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[3] The defendant raised three other claims of error to the Appellate Court which we did not certify for this appeal.

[4] General Statutes § 17-155bb(b) provides: "The commission shall not permit the disclosure of the identity, diagnosis, prognosis or treatment of any such patient which would constitute a violation of federal statutes concerning confidentiality of alcohol or drug patient records and any regulations pursuant thereto, or as they may be amended from time to time; and shall adopt regulations to protect the confidentially of information obtained by it."

"[General Statutes] Sec. 52-146d. (Formerly Sec. 52-146(a). PRIVILEGED COMMUNICATIONS BETWEEN PSYCHIATRIST AND PATIENT, DEFINITIONS. As used in sections 52-146c to 52-146i, inclusive:

"(1) 'Authorized representative' means (A) a person empowered by a patient to assert the confidentiality of communications of records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is deceased, his personal representative or next of kin, or (C) if a patient is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who had been or is appointed to act for the patient, or (ii) for the purpose of maintaining

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criminal defendant has a constitutional right to cross-examine state witnesses, however, which may include

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confidentiality until a guardian or conservator is appointed, the patient's nearest relative;

"(2) 'Communications and records' means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility;

"(3) 'Consent' means consent given in writing by the patient or his authorized representative;

"(4) 'Identifiable' and 'identify a patient' refer to communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to, or (B) codes or number which are in general use outside of the mental health facility which prepared the communications and records;

"(5) 'Mental health facility' includes any hospital, clinic, ward, psychiatrist's office or other facility, public or private, which provides inpatient or outpatient service, in whole or in part, relating to the diagnosis or treatment of a patient's mental condition;

"(6) 'Patient' means a person who communicates with or is treated by a psychiatrist in diagnosis or treatment;

"(7) 'Psychiatrist' means a person licensed to practice medicine who devotes a substantial portion of his time to the

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impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. *Delaware v. Fensterer*, 474 U.S. 15, 19, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985) (per

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practice of psychiatry, or a person reasonably believed by the patient to be so qualified."

"[General Statutes] Sec. 52-146e. DISCLOSURE OF COMMUNICATIONS. (a) All communications and records as defined in section 52-146d shall be confiential [sic] and shall be subject to the provisions of section 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

"(b) Any consent given to waive the confidentiality shall specify to what person or agency the information is to be disclosed and to what use it will be put. Each patient shall be informed that his refusal to grant consent will not jeopardize his right to obtain present or future treatment except where disclosure of the communications and records is necessary for the treatment.

"(c) The patient or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the person or office in which the original consent was filed. Withdrawal of consent shall not affect communications or records disclosed prior to notice of the withdrawl [sic]."

Both parties have assumed, and therefore so do we for the purposes of this appeal, that the alcohol treatment and psychiatric privileges are coextensive and have the same exceptions.

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curiam) *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Storlazzi*, 191 Conn. 453, 457, 464 A.2d 829 (1983). Thus, in some instances, a patient's psychiatric privilege must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility.[5] *State v. Hufford*, 205 Conn. 386, 401-402, 533 A.2d 866 (1987); *State v. Pierson*, 201 Conn. 211, 227, 514 A.2d 724 (1986); see also *Davis v. Alaska*, supra, 320 (defendant's right to cross-examine for bias is paramount to state's policy of protecting juvenile offender's identity). The defendant's right of cross-examination does not, however, allow him to discredit and impeach "in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, supra, 20; *Ohio v. Roberts*, 448 U.S. 56, 73 n.12, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). We have therefore directed trial courts to engage in a specific procedure designed to accommodate this inherent tension.

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See *In re Robert H.*, 199 Conn. 693, 709, 509 A.2d 475 (1986) (same privilege applies regarding sexual assault victim's disclosures to rape crisis counselors); see also *State v. Rollinson*, 203 Conn. 641, 526 A.2d 1283 (1987).

[5] It is of no moment in this case whether a defendant's constitutional right to discredit witnesses by accessing their psychiatric records stems from the sixth amendment's confrontation clause; *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); from the fourteenth amendment's due process clause, as proposed by four justices of the United States Supreme Court; *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); or from either the confrontation or due process clause of our state constitution. Conn. Const., art. I, § 8; see *State v. Hufford*, 205 Conn. 386, 401-402, 533 A.2d 866 (1987). We postpone deciding this question until we have a case in which it would make a difference or until the United States Supreme Court offers us further guidance.

If, for the purposes of cross-examination, a defendant believes that certain privileged records would disclose information especially probative of a witness' ability to comprehend, know or correctly relate the truth, he may, out of the jury's presence, attempt to make a preliminary showing that "there is a reasonable ground to believe" that the failure to produce the records would likely impair his right to impeach the witness. *State v. Pierson*, supra, 225; *State v. Esposito*, 192 Conn. 166, 179, 471 A.2d 949 (1984). If in the trial court's judgment the defendant successfully makes this showing, the state must then obtain the witness' permission for the court to inspect the records in camera. A witness' refusal to consent to such an in camera inspection entitles the defendant to have the witness' testimony stricken. *State v. Burak*, 201 Conn. 517, 524, 518 A.2d 639 (1986); *State v. Bruno*, 197 Conn. 326, 331, 497 A.2d 758 (1985), cert. denied, 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed.2d 181 (1986); *State v. Esposito*, supra, 179-80.

Upon inspecting the records in camera, the trial court must determine whether the records are especially probative of the witness' capacity to relate the truth or to observe, recollect and narrate relevant occurrences. *State v. Esposito*, supra, 176; *State v. Storlazzi*, supra, 459 n.4. If the court determines that the records are probative, the state must obtain the witness' further waiver of his privilege concerning the relevant portions of the records for release to the defendant, or have the witness' testimony stricken. If the court discovers no probative and impeaching material, the entire record of the proceeding must be sealed and preserved for possible appellate review. *State v. Hufford*, supra, 404; *State v. Pierson*, supra, 228. Once the

trial court has made its inspection, the court's determination of a defendant's access to the witness' records lies in the court's sound discretion, which we will not disturb unless abused. *State v. Herring*, 210 Conn. 78, 109, 554 A.2d 686 (1989); *State v. Kelly*, 208 Conn. 365, 380, 545 A.2d 1048 (1988).

In this case, in order to induce the trial court to inspect the records in camera, the defendant had to make a threshold showing that there was a reasonable probability that the records would reveal that "at any pertinent time" Knous' alcohol problem affected his testimonial capacity "to a sufficient degree to warrant further inquiry." *State v. Pierson*, supra, 225-26; *State v. Esposito*, supra, 180.[6] Upon reviewing the record, the Appellate

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[6] The Appellate Court stated that "[t]he defendant is required to make 'a plausible showing that [these psychiatric records] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.' *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)." *State v. D'Ambrosia*, 14 Conn. App. 309, 317, 541 A.2d 880 (1988). The Appellate Court apparently gleaned this standard from *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987), which quoted from *Valenzuela-Bernal* after stating: "Ritchie, of course, may not require the trial court to search through the [witness'] file without first establishing a basis for his claim that it contains material evidence." However, "absent any knowledge of the contents of [his] psychiatric records, it is impossible to determine whether they included relevant impeaching evidence that was not cumulative or was contrary to [his] testimony." *State v. Pierson*, 201 Conn. 211, 226, 514 A.2d 724 (1986); *State v. Bruno*, 197 Conn. 326, 332, 497 A.2d 758 (1985). Thus, such a showing must, perforce, consist of a certain amount of speculation. We do not read *Ritchie* or *Valenzuela-Bernal* to require a defendant to make a greater showing than our cases have previously required.

Court agreed with the trial court that the defendant had failed to make such a showing. *State v. D'Ambrosia*, supra, 14 Conn. App. 317. We agree.

Defense counsel established no more than that Knous had been an alcoholic for two years prior to the incident, had undergone court ordered alcohol treatment, including group and individual therapy, had occasionally used other drugs and had consumed alcohol on the day of the incident. The court received no information regarding how Knous' alcohol or drug use, or any other psychological disorder, might have affected his testimonial capacity sufficiently to require an inspection of his psychiatric records in camera. Thus, neither the trial court nor the Appellate Court erred in concluding that the defendant had not made the requisite showing. A history of alcohol or drug treatment does not automatically make a witness fair game for disclosure of psychiatric records to a criminal defendant. Cf. *State v. Burak*, supra, 524-25.

The ultimate propriety of the conclusions reached by the trial court and the Appellate Court depends, however, upon a predicate inquiry: was the defendant afforded a fair opportunity to make the preliminary showing necessary for an in camera inspection? Although the availability of such an opportunity also involves a determination that is, in the first instance, within the trial court's discretion, we have urged trial courts to permit the defendant a certain latitude in his attempt to make such a showing. On this point, *State v. Pierson*, supra, offers a useful analogy. In that case the state charged the defendant with sexually assaulting the complainant, a thirteen year old boy. After the complainant himself had testified for the state, his therapist testified regarding the boy's account of

the assault. Id., 221. In cross-examining the therapist, the defendant sought to discover any mental aberrations of the complainant that might have reflected upon his credibility. Id., 226-27. To this end the defendant asked the therapist whether he had recently treated the complainant and his mother for "parent-child conflicts," as a hospital record indicated. The defendant intended the question to elicit an answer that would help make a preliminary showing to the trial court that the therapist had further information of the complainant's mental condition affecting his credibility. The trial court upheld the therapist's claim that responding to a question about the treatment's purpose would violate the psychiatrist-patient privilege. Id., 221. We found error, explaining that "[w]ithout any opportunity to ascertain whether such information exists, it would ordinarily be impossible for a defendant to lay the groundwork demanded by [our cases] as preliminary to a fair judicial determination of the availability of evidence of the mental condition of a witness significantly related to his testimonial capacity or credibility." Id., 226-27.

Although the instant case involves privileged records rather than privileged communications, the same principle applies. By sustaining the state's objections, on grounds of psychiatric privilege, to questions posed by defense counsel while she voir dired Knous, the court may well have effectively prohibited counsel from making the showing prerequisite to the court inspecting the records in camera. Specifically, when the court disallowed counsel from inquiring whether Knous had received a diagnosis as a result of his stay at the Connecticut Valley Hospital, whether there were psychiatric reasons for his hospitalization and why counselors thought he should

enter a halfway house upon release from the alcohol program, the court may have precluded her from making an already difficult showing. "The privilege cannot be permitted to bar the court from access to such information as is necessary to decide whether the occasion is one where the witness must waive the privilege or have his testimony expurgated from the case." Id., 227; see also *State v. Whitaker*, 202 Conn. 259, 272, 520 A.2d 1018 (1987).

On the present record, we cannot conclude that the court's error, which implicates the defendant's constitutional right to impeach and discredit state witnesses, was harmless beyond a reasonable doubt. As the defendant's alleged accomplice, Knous was the state's most vital witness. If his testimony had been discredited or stricken altogether, we cannot be certain that the jury would have returned the same guilty verdicts. Cf. *State v. Gonzales*, 186 Conn. 426, 435, 441 A.2d 852 (1982).[7]

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[7] The state contends that we can find harmless error because when asked if there were any psychiatric reasons for his hospitalization, the witness answered "No," before the state could object. This was only one of three erroneous rulings, however. In any case, the court made clear by its rulings that it did not intend to allow, even during voir dire, any questions that touched in any fashion upon Knous' psychiatric privilege.

In remanding this case, we anticipate that the trial court may well offer the defendant an opportunity to pursue this line of questioning beyond the three questions previously posed to the witness. Although placing a limit on such questioning is a matter within the trial court's discretion, the record below may well reflect trial counsel's decision to abort a line of questioning prematurely in order to comply with adverse rulings from the bench.

We conclude that this case must be remanded and the defendant given an opportunity to make a preliminary showing that the failure to produce Knous' psychiatric records would likely impair his right to impeach the witness. To the extent that certain of the defendant's questions relevant to making this showing infringe to some degree on Knous' psychiatric privilege, the state must secure Knous' limited waiver of the privilege. If, in the trial court's judgment, the defendant fails to make this showing, the defendant's convictions will stand. Should the court find, however, that the defendant has made the requisite showing, the state must obtain Knous' further waiver for the court to conduct an in camera inspection of the records. If in reviewing the records the court, in its discretion, finds no material especially probative of the witness' capacity to relate the truth, the convictions will stand and the court must seal the records for possible further appellate review. Should the court find such probative material, however, the state must obtain Knous' further waiver for release of the relevant portions of his records to the defendant and the court must grant the defendant a new trial. A new trial will also be required if at any juncture Knous refuses to waive his privilege. See *Pennsylvania v. Ritchie*, supra, 58; *State v. Pierson*, supra, 229; *State v. Esposito*, supra, 179-80.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* MICHAEL D'AMBROSIA
(5170)

BORDEN, DALY AND O'CONNELL, Js.

Amended information charging the defendant with the crimes of burglary in the first degree, burglary in the third degree, conspiracy to commit burglary in the third degree, attempted assault in the first degree, carrying a weapon in a motor vehicle and larceny in the sixth degree, brought to the Superior Court in the judicial district of New Haven, where the court, *McKeever, J.*, granted the defendant's motion for acquittal as to the first count; thereafter, the matter was tried to the jury; verdict and judgment of guilty of burglary in the third degree, conspiracy to commit burglary in the third degree, attempted assault in the first degree and larceny in the sixth degree, from which the defendant appealed to this court. *No error.*

Susan M. Hankins, assistant public defender, for the appellant (defendant).

James A. Killen, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Clifford* and *James G. Clark*, assistant state's attorneys, for the appellee (state).

DALY, J. The defendant appeals from the judgment of conviction, after a jury trial, of burglary in the third degree in violation of General Statutes § 53a-103(a), conspiracy to commit burglary in the third degree in violation of General Statutes §§ 53a-103(a) and 53a-48(a), criminal attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49(a) and 53a-59(a)(1), and larceny in the sixth degree in violation of General Statutes § 53a-125b.

The defendant claims that the trial court erred (1) in failing to suppress evidence seized pursuant to an automobile search, (2) in denying the defendant access to the psychiatric records of a state's witness, (3) in admitting opinion evidence to hypothetical questions, and (4) in determining there was sufficient evidence to convict the defendant of criminal attempt to commit assault in the first degree.

The jury could reasonably have found the following facts. On October 29, 1985, the complainant, a seventy-nine year old woman, returned to her house on Leetes Island Road in Guilford and discovered that the rear door to the house had been smashed. Officer Michael Dennison of the Guilford police department investigated the break-in. One of the complainant's neighbors informed Dennison that she had observed a heavy set white male in dark clothing run down the driveway and enter a dark, older model American car with a white top. The neighbor stated that she also observed the passenger of the car, who was a heavy set white male with messy, dirty blonde hair and an unkempt beard, and who also wore dark clothing. The complainant mentioned to the officer that she had been involved in a motor vehicle accident the previous day.

Approximately forty-five minutes later, an officer observed a car being driven by the defendant and carrying a passenger, a defendant in a related action, Albert Knous, which matched the neighbor's description. The officer then processed the license plate number through the state department of motor vehicles and determined that the license plate was not registered to be on that particular car.

Another officer, Steven Spurrell, approached the vehicle which he found parked in front of the town hall and asked the defendant for his license and registration. The defendant was unable to produce either document, but indicated that the car belonged to Jonathan Schofield, a friend of his, who was working that day. At this time, another officer had arrived at the scene and both the defendant and Knous were searched for weapons. The defendant and Knous denied any knowledge of the reported burglary. Spurrell testified that he had known both the defendant and Knous as "regular customers" with the Guilford police department. On the basis of his knowledge of the two men's previous involvement with the police, including an arrest for carrying a weapon in a motor vehicle, Spurrell checked the vehicle for weapons. A hunting knife with a seven inch blade was found under the driver's seat. Both men were arrested for carrying a weapon in a motor vehicle.

The following day, October 30, 1985, John Schofield, the owner of the seized vehicle, indicated to the police that he had allowed the defendant permission to use his car. Schofield consented to a search of his car. The police seized a metal box from the trunk of the car and from the interior of the car, they seized a motor vehicle accident report concerning the accident the previous day involving the complainant.

At trial, Knous testified for the state and acknowledged that the defendant had approached him while he was picking apples on Long Hill Road. Knous testified that the defendant told him that he had broken into a garage at 98 Leetes Island Road and cut the brake lines to the car in the garage and stole a metal tool box from the

garage. At that time, the defendant informed Knous of a television set that he observed at the premises and asked Knous if he wanted to join him, steal the television and divide the proceeds of its sale. The pair proceeded to 98 Leetes Island Road where Knous entered through the rear door which he claimed was previously smashed. Upon hearing a car coming up the driveway, Knous departed without taking anything.

Additionally, the state produced expert testimony which indicated that the brake line tubing of the complainant's car was cut by means of a knife-type instrument. Neither expert could, however, determine whether the knife which had been seized by the police was the cutting instrument used. Both experts testified that the complainant would not have been able to stop her vehicle upon descending her steep driveway which led to an intersection. Moreover, the experts testified as to what would happen when a driver applied his brakes, after the brake lines of a car had been cut.

I

In his first claim of error, the defendant claims that the trial court erred in refusing to suppress the evidence obtained from Schofield's car. Specifically, the defendant claims error in the seizure of the knife discovered underneath the seat and the seizure of the metal tool box recovered from the trunk. We find no merit in the defendant's argument.

A

The court did not err by allowing the knife seized from the car into evidence. The defendant maintains that a *Terry* stop was not justified in this case because the descriptions of the car and of the passenger were too general in nature. *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In support of this argument, the defendant cites *United States* v. *Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 66 L. Ed. 2d 261 (1981), which states that, in order to have a *Terry* stop withstand challenge, the "detaining officers must have a particularized and objective basis for suspecting the particular person[s] stopped of criminal activity." The defendant argues that there was no such particularized description, such as the marker plate, the make of the car, the age of the passenger, his height, facial features, or clothing, that would supply a distinctive description to justify a *Terry* stop.

"[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry* v. *Ohio*, supra, 22. The United States Supreme Court has recognized that "it may be the essence of good police work to adopt an immediate response." *Adams* v. *Williams*, 407 U.S. 143, 145, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). Although the defendant asserts that the police need a specific and particular description, our Supreme Court has stated that "[w]hat constitutes a reasonable and articulable suspicion depends on the totality of the circumstances." *State* v. *Aillon*, 202 Conn. 385, 399, 521 A.2d 555 (1987).

In the present case, Spurrell was justified in detaining the defendant and Knous to investigate both the misuse of the license plate and the burglary. See *State* v. *Perez*, 181 Conn. 299, 304, 435 A.2d 334 (1980). The car was stopped within two and one-half miles of the situs of the crime and within an hour of the time when the dispatcher had received the initial complaint. " 'Proximity in time and place of the stop to the crime is highly significant' in the determination of whether an investigatory detention is justified by reasonable and articulable suspicion." (Citations omitted.) *State* v. *Aillon*, supra, 400, quoting *State* v. *Aversa*, 197 Conn. 685, 691, 501 A.2d 370 (1985). Additionally, the similarities between the neighbor's description of the culprits and their car, with the actual appearance of the car and Knous was sufficient to warrant Spurrell in making an investigatory stop. See *State* v. *Mitchell*, 7 Conn. App. 46, 507 A.2d 1017, cert. granted, 200 Conn. 805, 512 A.2d 230 (1986). Furthermore, the officer would have been justified in making a stop of the vehicle for an apparent violation of improper use of registration. General Statutes § 14-147(c); *State* v. *Mitchell*, supra, 60. Under the totality of circumstances, we cannot say that the police action was inappropriate or unreasonable under the fourth amendment.

Since the officer was justified in making the stop, he was justified in "patting down" the defendant and conducting a protective search of the passenger compartment of the car. *Michigan* v. *Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983); *Terry* v. *Ohio*, supra, 21. Moreover, Spurrell's first hand knowledge of the criminal history of both the defendant and Knous justified the protective search. *Michigan* v. *Long*, supra, 1049-50.

B

The defendant claims that the trial court erred in admitting the gray metal tool box found in the trunk of the car pursuant to Schofield's consent to search the car the following day. Schofield reclaimed the car from the police station the day after it was impounded because he needed it for work. The defendant claims that Schofield's consent was involuntary and invalid. Because we find that the defendant is not entitled to challenge the search, we do not consider these issues.

In order for a defendant to challenge a search of an automobile, he must establish that he had a reasonable expectation of privacy in the area searched. *State* v. *Manson*, 13 Conn. App. 220, 535 A.2d 829 (1988). In this case, while there may be evidence that the defendant had an expectation of privacy on October 29, during the period of time he used the car; see, e.g., *United States* v. *Rose*, 731 F.2d 1337 (8th Cir. 1984) (permissive use of automobile may provide basis for assertion of fourth amendment claims); the defendant established no facts alleging that the expectation of privacy continued to the following day when the car was reclaimed by its owner. Thus, the court did not err in admitting the tool box into evidence.

II

The defendant's second claim of error is that the court improperly denied the defendant's request for an examination of Knous' psychiatric records. Prior to cross-examination, counsel for the defense questioned Knous outside the presence of the jury concerning his treatment for alcoholism at Connecticut Valley Hospital. Knous

stated that he had been admitted to a twenty-eight day alcohol program and that he had been drinking on the day of the burglary.[1] The defendant argues that the trial court's ruling denying access to Knous's psychiatric records precluded him from cross-examining the state's key witness on facts highly probative of credibility, capacity to perceive and ability to recall facts, thereby impairing his right of confrontation.

The defendant cites *State* v. *Storlazzi*, 191 Conn. 453, 462, 464 A.2d 829 (1983), in support of his claim of error. In *Storlazzi*, the court reaffirmed its holding in *State* v. *Grasso*, 172 Conn. 298, 302, 374 A.2d 239 (1977), stating "that 'when a conviction depends entirely upon the testimony of certain witnesses . . . information affecting their credibility is material in the constitutional sense since if they are not believed a reasonable doubt of guilt would be created.' " *State* v. *Storlazzi*, supra. It is clear that the state relied heavily on Knous' testimony.

The United States Supreme Court has recently held that the right to confrontation is the right to cross-examine and not the right of an all-inclusive cross-examination. In *Pennsylvania* v. *Ritchie*, ___ U.S. ___, ___, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987), the Supreme Court held: "[T]he right of confrontation is a *trial* right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. . . . The ability to question adverse witnesses, however, does not include the power to require the pretrial

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[1] When Knous was questioned by defense counsel about whether he had been "drinking to excess," Knous replied, "I had been drinking. Excessive, I don't know."

disclosure of any and all information that might be useful in contradicting unfavorable testimony. Normally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses. *Delaware* v. *Fensterer*, supra, 21-22. In short, the Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original).

In the present case, the defendant was provided wide latitude at trial to question Knous. The trial court stated that the questioning of Knous concerning his treatment for alcoholism "might very well have something to do with the credibility of his testimony and certainly [the defendant is] at liberty to take that up in front of the jury."

Furthermore, in *State* v. *Burak*, 201 Conn. 517, 523, 518 A.2d 639 (1986), our Supreme Court held that when the claimed impeaching material is privileged, the party must make an offer of proof that failure to produce the material would impair his confrontational rights. See also *State* v. *Esposito*, 192 Conn. 166, 179-80, 471 A.2d 949 (1984). The defendant is required to make "a plausible showing that [these psychiatric records] would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). We have reviewed the record and agree with the trial court that the defendant failed to make the necessary preliminary showing that the failure to produce the psychiatric records was likely to impair his confrontational rights.

III

The defendant's third claim of error is that the trial court erred in allowing two of the state's witnesses to answer hypothetical questions.[2] Specifically, the defendant argues that the state failed to demonstrate that either witness had any specialized skill or knowledge to

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[2] The state asked the first expert the following questions:

"Q. And based on your knowledge of automobiles and your experience, do you have an opinion as to whether you were, if you were coming down that driveway without using any brakes and when you got to the bottom for the first time and you attempted to apply brakes, when the front line was cut, do you have an opinion as to whether that car would stop at all at the bottom of the driveway?

"A. I think that if you were not anticipating any problem, having any problem, and you just drove normally down the driveway and came to the end and put the brakes on, you would just – you wouldn't stop in time, you would go right across. It goes right on to the road and comes right onto the right at a right angle, and I think that in that situation it would just go right across the road.

"Q. If you were just driving down a street at forty miles per hour and came to a stop sign and went to hit the brakes, first of all, would the front lines cut as it was, what would happen with that pedal when you put your foot on it, the brake pedal?

"A. Okay?. I said, again it would just slide. The back wheels would just slide. You would catch a little bit at the bottom, the brake pedal, and that would be the back brakes actuating and the weight would come forward on the car and there would not be enough traction on the back wheels to stop the car. It would stop eventually, but it would take a much longer time to do it."

(Continued on following page)

offer an opinion beyond the ability of the average juror, as to what would occur if the car with the broken brake line had been driven.

As a preliminary matter we note that the trial court has wide discretion in ruling on the "qualification of expert witnesses and the admissibility of their opinions." *State* v. *Kemp*, 199 Conn. 473, 476, 507 A.2d 1387 (1986). Moreover, it is rare for a reviewing court to find that a trial court has erred in permitting such testimony. *State* v. *Palmer*, 196 Conn. 157, 168, 491 A.2d 1075 (1985); B. Holden and J. Daly, Connecticut Evidence § 118(a). The trial court's decision that a witness qualifies as an expert and that the testimony is admissible "is 'not to be disturbed . . . "unless [its] decision [sic] has been abused or

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(Continued from previous page)

The state's second expert witness was asked the following:

"Q. I would ask you once again and specifically your knowledge of the physical stature of Winford Andrews if she was driving down the street at between thirty to forty miles per hour without knowing that she had any difficulty in the front brakes and came to an intersection, what would happen when she put her foot on the brake pedal?

"A. I doubt very seriously that it would stop in an intersection. She would panic first.

"Q. Why would that be?

"A. Because there would be that lag in the braking system where there would be no pressure at all until she got at least half way down to the floor. So, therefore, what I have done myself is I have taken my foot off the brake and hit it again. By that time she is through the intersection the dog is dead or whatever."

the error is clear and involves a misconception of the law." ' " *Going* v. *Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976); *State* v. *Biller*, 190 Conn. 594, 617, 462 A.2d 987 (1983).

" 'Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to the matter in issue; (2) that skill or knowledge is not common to the average person; and (3) the testimony would be helpful to the court or jury in considering the issues.' *State* v. *Kemp*, [supra, 476]." *State* v. *Vilalastra*, 9 Conn. App. 667, 679, 521 A.2d 170 (1987).

One witness worked as a welder in an automobile manufacturing plant who did his own car mechanic work and was familiar with braking systems. This witness was, moreover, the party responsible for repairing the broken brake line on the complainant's car. The second witness was a car mechanic with nineteen years experience in braking systems. The trial court did not err in deciding that these two witnesses were qualified as experts. The two witnesses enjoyed a special skill and knowledge "beyond the ken of the average juror, that, properly applied, would be helpful to the determination of the ultimate issue." *Siladi* v. *McNamara*, 164 Conn. 510, 513, 325 A.2d 277 (1973).

Additionally, the defendant objected to a question to the expert brake witness as having no basis in the evidence. The question: "If you were just driving down a street at forty miles per hour and came to a stop sign and went to hit the brakes, first of all, what would happen with that pedal when you put your foot on it, the brake pedal?"

"The admissibility of a hypothetical question calls for the exercise of sound discretion as to whether the question, even though it does not contain all of the facts in evidence, presents the facts in such a manner that they bear a true and fair relationship to each other and to the whole evidence in this case, whether it is not so worded as to be likely to mislead or confuse the jury and, further, whether it is not so lacking as to be without value in the decision of the case. *Healy* v. *White*, 173 Conn. 438, 446-47, 378 A.2d 540 (1977)." *State* v. *Hardwich*, 1 Conn. App. 609, 617, 475 A.2d 315 (1987).

As in *Hardwich*, the question did not ask the experts to reach a conclusion based on misleading representation of facts. It merely asked them to project the result of a possible situation. We thus conclude that the trial court did not abuse its discretion in allowing the question and its answer.

IV

The defendant's final claim is that there was insufficient evidence produced at trial from which the jury could have found the defendant guilty of criminal attempt to commit assault in the first degree in violation of General Statutes § 53a-59.[3] The defendant argues that

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[3] Section 53a-59 provides in relevant part: "ASSAULT IN THE FIRST DEGREE: CLASS B FELONY. (a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument. . . ."

the element of specific intent to cause serious physical injury had not been proven.

An examination of the sufficiency of the evidence requires this court to make a bifurcated analysis. *State* v. *Baskins*, 12 Conn. App. 313, 316, 530 A.2d 633 (1987). First, we review the record and construe it in a light most favorable to sustaining the verdict. *State* v. *Cimino*, 194 Conn. 210, 211, 478 A.2d 1005 (1984); *State* v. *Waterman*, 7 Conn. App. 326, 338, 509 A.2d 518 (1986). Second, we determine whether, " 'the jury could have reasonably concluded, upon the facts established, guilt beyond a reasonble [sic] doubt.' " *State* v. *Braxton*, 196 Conn. 685, 691, 495 A.2d 273, quoting *State* v. *Cimino*, supra, 211. In the present case, the review is of the specific intent of the defendant. Our Supreme Court has stated: "Intent is a mental process, and absent an outright declaration of intent, must be proved through inferences drawn from the actions of an individual, i.e., by circumstantial evidence." *State* v. *Crump*, 201 Conn. 489, 495, 518 A.2d 378 (1986). Furthermore, "any inference drawn must be rational and founded upon the evidence." *State* v. *Williams*, 202 Conn. 349, 355, 521 A.2d 150 (1987); see also B. Holden and J. Daly, Connecticut Evidence, § 66(c).

Construing, as we must, the evidence in the light most favorable to sustaining the verdict, the jury could have readily found the following facts: (1) the defendant was full of rage over the fact that, as a result of his accident with the complainant, his car was totalled and he could not get compensated by his insurance company; (2) the defendant had broken into the house and garage; (3) during the break-in, the defendant maliciously severed the brake lines with a hunting knife that he had

brought with him for the sole purpose of doing such; (4) a car with its brake lines severed would not be able to stop when approaching oncoming traffic; (5) the steep decline of the driveway would cause the car to obtain some speed before entering the busy intersection below; and (6) the complainant due to her age and frailness, would incur serious bodily injury. Such a review of the evidence leaves us to conclude that the conviction must stand.

There is no error.

In this opinion the other judges concurred.

CONNECTICUT GENERAL STATUTES

§ 17-155bb. Records, keeping and confidentiality of. Disclosure permitted, when

(a) Medical treatment facilities shall keep and submit such records of all persons examined, admitted or treated pursuant to this chapter, as may be required by the commission.

(b) The commission shall not permit the disclosure of the identity, diagnosis or treatment of any such patient which would constitute a violation of federal statutes concerning confidentiality of alcohol or drug patient records and any regulations pursuant thereto, or as they may be amended from time to time; and shall adopt regulations to protect the confidentiality of information obtained by it.

(c) The executive director may utilize or make available to authorized persons information from patients' records for purposes of conducting scientific research, management audits, financial audits, or program evaluation, provided such information shall not be utilized in a manner that discloses a patient's name or other identifying information.

§ 52-146d. Privileged communications between psychiatrist and patient. Definitions

As used in sections 52-146c to 52-146i, inclusive:

(1) "Authorized representative" means (A) a person empowered by a patient to assert the confidentiality of communications or records which are privileged under sections 52-146c to 52-146i, inclusive, or (B) if a patient is

deceased, his personal representative or next of kin, or (C) if a patient is incompetent to assert or waive his privileges hereunder, (i) a guardian or conservator who has been or is appointed to act for the patient, or (ii) for the purpose of maintaining confidentiality until a guardian or conservator is appointed, the patient's nearest relative;

(2) "Communications and records" means all oral and written communications and records thereof relating to diagnosis or treatment of a patient's mental condition between the patient and a psychiatrist, or between a member of the patient's family and a psychiatrist, or between any of such persons and a person participating under the supervision of a psychiatrist in the accomplishment of the objectives of diagnosis and treatment, wherever made, including communications and records which occur in or are prepared at a mental health facility;

(3) "Consent" means consent given in writing by the patient or his authorized representative;

(4) "Identifiable" and "identify a patient" refer to communications and records which contain (A) names or other descriptive data from which a person acquainted with the patient might reasonably recognize the patient as the person referred to, or (B) codes or numbers which are in general use outside of the mental health facility which prepared the communications and records;

(5) "Mental health facility" includes any hospital, clinic, ward, psychiatrist's office or other facility, public or private, which inpatient or outpatient service, in whole or in part, relating to the diagnosis or treatment of a patient's mental condition;

(6) "Patient" means a person who communicates with or is treated by a psychiatrist in diagnosis or treatment;

(7) "Psychiatrist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified.

§ 52-146e. Disclosure of communications

(a) All communications and records as defined in section 52-146d, shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Except as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.

(b) Any consent given to waive the confidentiality shall specify to what person or agency the information is to be disclosed and to what use it will be put. Each patient shall be informed that his refusal to grant consent will not jeopardize his right to obtain present or future treatment except where disclosure of the communications and records is necessary for the treatment.

(c) The patient or his authorized representative may withdraw any consent given under the provisions of this section at any time in a writing addressed to the person or office in which the original consent was filed. Withdrawal of consent shall not affect communications or records disclosed prior to notice of the withdrawal.

§ 52-146f. Consent not required for disclosure, when

Consent of the patient shall not be required for the disclosure or transmission of communications or records of the patient in the following situations as specifically limited:

(1) Communications or records may be disclosed to other persons engaged in the diagnosis or treatment of the patient or may be transmitted to another mental health facility to which the patient is admitted for diagnosis or treatment if the psychiatrist in possession of the communications or records determines that the disclosure or transmission is needed to accomplish the objectives of diagnosis or treatment. The patient shall be informed that the communications or records will be so disclosed or transmitted. For purposes of this subsection, persons in professional training are to be considered as engaged in the diagnosis or treatment of the patients.

(2) Communications or records may be disclosed when the psychiatrist determines that there is substantial risk of imminent physical injury by the patient to himself or others or when a psychiatrist, in the course of diagnosis or treatment of the patient, finds it necessary to disclose the communications or records for the purpose of placing the patient in a mental health facility, by certification, commitment or otherwise, provided the provisions of sections 52-146d to 52-146j, inclusive, shall continue in effect after the patient is in the facility.

(3) Except as provided in section 17-295c, the name, address and fees for psychiatric services to a patient may be disclosed to individuals or agencies involved in the collection of fees for such services. In cases where a

dispute arises over the fees or claims or where additional information is needed to substantiate the fee or claim, the disclosure of further information shall be limited to the following: (A) That the person was in fact a patient; (B) the diagnosis; (C) the dates and duration of treatment; and (D) a general description of the treatment, which shall include evidence that a treatment plan exists and has been carried out and evidence to substantiate the necessity for admission and length of stay in a health care institution or facility. If further information is required, the party seeking the information shall proceed in the same manner provided for hospital patients in section 4-105.

(4) Communications made to or records made by a psychiatrist in the course of a psychiatric examination ordered by a court or made in connection with the application for the appointment of a conservator by the probate court for good cause shown may be disclosed at judicial or administrative proceedings in which the patient is a party, or in which the question of his incompetence because of mental illness is an issue, or in appropriate pretrial proceedings, provided the court finds that the patient has been informed before making the communications that any communications will not be confidential and provided the communications shall be admissible only on issues involving the patient's mental condition.

(5) Communications or records may be disclosed in a civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when his condition is introduced by a party claiming or defending through or as a beneficiary of the patient and the court or judge finds

that it is more important to the interests of justice that the communications be disclosed than that the relationship between patient and psychiatrist be protected.

(6) Communications or records may be disclosed to the commissioner of health services in connection with any inspection, investigation or examination of an institution, as defined in subsection (a) of section 19a-490, authorized under section 19a-498.

§ 52-146g. Access to communications and records by persons engaged in research

(a) A person engaged in research may have access to psychiatric communications and records which identify patients where needed for such research, if such person's research plan is first submitted to and approved by the director of the mental health facility or his designee.

(b) The communications and records shall not be removed from the mental health facility which prepared them. Coded data or data which does not identify a patient may be removed from a mental health facility, provided the key to the code shall remain on the premises of the facility.

§ 52-146h. Transfer of information to mental health commissioner. Storage of records and communications

(a) Any mental health facility may transmit information and records, if requested, to the commissioner of mental health pursuant to his obligation under section 17-210a to maintain, subject to the approval of the board

of mental health, the overall responsibility for the care and treatment of the mentally ill. The commissioner of mental health may collect and use the information and records for administration, planning or research, subject to the provisions of section 52-146g. The commissioner of mental health may enter into contracts within the state and into interstate compacts for the efficient storage and retrieval of the information and records.

(b) Identifiable data shall be removed from all information and records before issuance from the mental health facility which prepared them and a code, the key to which shall remain in possession of the issuing facility and be otherwise available only to the commissioner of mental health for purposes of planning, administration or research, shall be the exclusive means of identifying patients. The key to the code shall not be available to any data banks in which the information is stored or to any other persons, corporations or agencies, private or governmental.

§ 52-146i. Labeling of confidential records

All written communications or records disclosed to another person or agency shall bear the following statement: "The confidentiality of this record is required under chapter 899 of the Connecticut general statutes. This material shall not be transmitted to anyone without written consent or other authorization as provided in the aforementioned statutes." A copy of the consent form specifying to whom and for what specific use the communication or record is transmitted or a statement setting forth any other statutory authorization for transmittal and the limitations imposed thereon shall accompany

such communication or record. In cases where the disclosure is made orally, the person disclosing the information shall inform the recipient that such information is governed by the provisions of sections 52-146d to 52-146j, inclusive.

STATE OF CONNECTICUT
SUPREME COURT

Hartford, 4 July 1989

To the Chief Clerk of the Supreme Court

The Supreme Court has decided the following case:

STATE OF CONNECTICUT)
) *Opinion by*
v.) Peters, C. J.
MICHAEL D' AMBROSIA)
(13507)

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for further proceedings consistent with this opinion.

/s/ Ellen A. Peters
Chief Justice.

STATE OF CONNECTICUT
SUPREME COURT

NO. 13507

STATE OF CONNECTICUT

V. : SEPTEMBER 27, 1989

MICHAEL D'AMBROSIA

ORDER

THE MOTION FOR REARGUMENT AND/OR RECONSIDERATION, FILED BY THE STATE OF CONNECTICUT JULY 13, 1989, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 9-28-89
DONALD DAKERS, P.D.
CAROLYN K. LONGSTRETH, A.S.A.
JULIA D. DEWEY, A.S.A.
JAMES A. KILLEN, D.A.S.A.
NEW HAVEN SUPERIOR COURT (CR8-72485)
HON. MARTIN McKEEVER
REPORTER OF JUDICIAL DECISIONS

NO. 89-866

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CONNECTICUT, petitioner

v.

MICHAEL D'AMBROSIA, respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

G. DOUGLAS NASH
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DECEMBER 27, 1989

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B. In an unbroken line of cases interpreting Connecticut General Statutes 52-146e, the Connecticut Supreme Court has employed a balancing procedure which comports with the due process standard of Pennsylvania v. Ritchie. 5

C. The due process clause and confrontation clause of the Constitution of the State of Connecticut as well as the federal constitution, justify the decision reached in the present case. 7

D. There is no substantial conflict between state court decisions as to the constitutional basis for disclosure of privileged materials or to the degree of disclosure required. 9

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QUESTIONS PRESENTED

1. Did the Connecticut Supreme Court hold that a defendant is entitled under the federal right to confrontation to discover information contained in confidential records, contrary to Pennsylvania v. Ritchie?

2. Did the Connecticut Supreme Court, which held for the defendant on state constitutional grounds as well as on the basis of federal due process as stated in Pennsylvania v. Ritchie, establish a burden of proof that is contrary to the holding of Ritchie?

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NO. 89-866

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF CONNECTICUT, petitioner

v.

MICHAEL D'AMBROSIA, respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Michael D'Ambrosia respectfully requests the Court to deny the petition for a writ of certiorari, seeking review of the Connecticut Supreme Court's opinion.[1] That opinion was decided on July 4, 1989, and is reported as State v. D'Ambrosia, 212 Conn. 50, 561 A.2d 422 (1989). The decision of the Connecticut Appellate Court is reported at 14 Conn. App. 309, 541 A.2d 880 (1988).[2]

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1 All parties to the proceeding are named in the caption of this case.

2 Hereinafter, citation to the case is to the pages of the petitioner's appendix, Pet. App. at 1A-15A, and to the decision in the Connecticut Appellate Court, Pet. App. at 16A-30A.

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTES

Sec. 52-146e. Disclosure of communications. (a) All communications and records as defined in section 52-146d shall be confidential and shall be subject to the provisions of sections 52-146d to 52-146j, inclusive. Exception as provided in sections 52-146f to 52-146i, inclusive, no person may disclose or transmit any communications and records or the substance or any part or any resume thereof which identify a patient to any person, corporation or governmental agency without the consent of the patient or his authorized representative.[3]

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise, infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

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3 The respondent relies on the statutes as they appear in petitioner's appendix at Pet. App. 31A-38A.

process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CONNECTICUT

ARTICLE 1, SECTION 8

Sec. 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, not shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

STATEMENT OF THE CASE

The respondent relies upon the facts as stated by petitioner, pages 4-7, with the addition of the following supplemental facts.

Albert Knous, the witness whose records were at issue, was a co-defendant who cooperated with the prosecution and testified against the respondent. Following Knous' direct testimony before the jury, defense counsel was precluded by the trial court from questioning Knous regarding his mental problems, the nature of

the problems for which he received treatment, and the basis of recommendations for referral to a halfway house.

The trial court sustained the prosecution's objections to these questions despite the fact that the witness, Knous, had at no time asserted any claim of privilege or confidentiality of the information. Although the prosecutor objected to those lines of inquiry and maintained that defense counsel had not made a sufficient showing to require disclosure of confidential records, he requested that the trial court determined whether the witness would waive his privilege so that the court could make an in camera inspection of the records. The court denied the prosecutor's request.

REASONS WHY PETITION SHOULD BE DENIED

THE CONNECTICUT SUPREME COURT IN STATE V. D'AMBROSIA, DID NOT HOLD THAT A DEFENDANT IS ENTITLED UNDER THE FEDERAL RIGHT TO CONFRONTATION TO DISCOVER INFORMATION CONTAINED IN CONFIDENTIAL RECORDS, CONTRARY TO PENNSYLVANIA V. RITCHIE.

A. The Connecticut Supreme Court did not rule that the defendant was entitled to discover information contained in confidential records.

In the present case, the Connecticut Supreme Court ruled that the trial court had denied defense counsel sufficient opportunity to voir dire a key witness, and remanded for further preliminary proceedings. The Connecticut Supreme Court, however, clearly made no decision as to whether the defendant would ultimately be afforded access to confidential records. Indeed, that Court did not even reach the issue of the necessity for in camera judicial review. In its narrow decision, the Connecticut Supreme Court merely held that the defendant must be afforded

some greater latitude in questioning in his attempt to establish the threshold requisite for an in camera inspection by the trial court, and remanded the case for that purpose.

In the present posture of the case as decided by the Connecticut Supreme Court, it can only be speculated as to whether the witness will waive his privilege at relevant stages of the proceedings on remand, or whether defense counsel will elicit information which will mandate an in camera review. Whether that review will ultimately afford the defendant access to the witness' records is a question several stages removed from the current status of this case.

The decision in State v. D'Ambrosia is a narrow opinion, limited to its facts. The failure of the trial court to allow defense counsel sufficient latitude on cross-examination in order to establish whether judicial in camera review is warranted was the sole issue ruled on by the Connecticut Supreme Court. Contrary to the petitioner's construction of its decision, the Connecticut Supreme Court in this case decided only that the defendant should be given a fair opportunity to make a preliminary showing necessary for any in camera inspection. Pet. App. 12A. See also State v. Whitaker, 202 Conn. 259, 520 A.2d 1018 (1987), cited at Pet. App. 14A.

B. In an unbroken line of cases interpreting Connecticut General Statutes 52-146e, the Connecticut Supreme Court has employed a balancing procedure which comports with the due process standard of Pennsylvania v. Ritchie.

The statutes at issue in this case differ from the Pennsylvania statute, in that a witness' consent must be secured

prior to the privilege being breached. Lack of consent precludes even judicial review of confidential records. The decision in State v. D'Ambrosia, rather than abrogating the statutory protection, is fully in line with the prior Connecticut cases interpreting Connecticut Gen. Stat. 52-146e.

In numerous cases decided prior to Ritchie, the Connecticut Supreme Court ruled on the basis of the federal confrontation clause that the statute at issue and the privilege it accorded would have to be reconciled with the defendant's right to cross-examine. State v. Esposito, 192 Conn. 166, 471 A.2d 949 (1984); State v. Pierson, 201 Conn. 211, 514, A.2d 724 (1986); State v. Storlazzi, 191 Conn. 453, 458, 464 A.2d 839 (1983). In State v. Kelly, the Connecticut Supreme Court acknowledged this Court's decision in Ritchie and upheld the trial court's denial of access following in camera review, alternatively analyzing access to records under the rubric of discovery decisions. State v. Kelly, 208 Conn. 365, 380-81, 545 A.2d 1048 (1988). Far from rejecting the analytical framework provided by Ritchie, the Connecticut Supreme Court has relied upon it in upholding denial of access to a defendant under the facts of the Kelly case. Whether and to what extent access to records is granted is determined on a case by case basis, limited to the facts of the particular case. State v. Hufford, 205 Conn. 386, 403, 533 A.2d 866 (1987).[4]

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4 Given the individualized determination required, the prosecutor during the trial of the present case requested that the judge secure a waiver and review the records. The court declined as in Ritchie, to inspect the documents; or to secure a waiver.

The procedure authorized by the Connecticut Supreme Court from Storlazzi, supra, thru D'Ambrosia is much the same as that required by this Court in Ritchie. Upon establishing a basis for the claim of materiality, the defendant is entitled only to an in camera judicial review of the records, rather than full disclosure to the defense. Screening by the trial judge, common to both Ritchie and D'Ambrosia, is the method by which the inherent tension between the defendant's rights and the witness' rights is resolved. D'Ambrosia, Pet. App. 9A. Connecticut case law has determined, as has this Court in Ritchie, that the defendant's interest in a fair trial can be protected fully by in camera review of records by the trial court. In State v. D'Ambrosia, the Connecticut Supreme Court has simply required the trial court to allow the respondent defendant the opportunity to attempt to make the requisite threshold showing necessary for in camera judicial review.

C. The due process clause and confrontation clause of the Constitution of the State of Connecticut as well as the federal constitution, justify the decision reached in the present case.

The Connecticut Supreme Court has previously interpreted the same statute and held on independent state grounds that the procedure employed in its decision State v. D'Ambrosia is required by the Connecticut Constitution. State v. Hufford, 205 Conn. 386, at 402, 533 A.2d 866 (1987).

In Hufford, announced eleven months after this Court's decision in Pennsylvania v. Ritchie, the Connecticut Supreme Court specifically held that independent and adequate state

constitutional grounds required the procedure of in camera judicial review upon a sufficient threshold showing, citing Michigan v. Long, 463 U.S. 1032 (1983).

Connecticut General Statutes Section 52-146e provides that disclosure requires the consent of the patient. This state policy as enunciated in the legislation, C.G.S. 52-146e and case law differentiates the respondent's case from that of Ritchie. This Court in Ritchie recognized that state policies regarding confidential records could differ. Ritchie at 58. The policy embodied in both Connecticut case law and the statute requires that the party seeking access to confidential records make a threshold showing of necessity, rather than the automatic review of Ritchie. It is clear from the decision in State v. D'Ambrosia that the Connecticut Supreme Court relies upon both state constitutional and federal constitutional grounds and an analysis of the state statute in determining when the state statutory privileges will be breached.

Concluding its review of precedent bearing on the instant case, the Connecticut Supreme Court stated: "It is of no moment in this case whether a defendant's constitutional right to discredit witnesses by accessing their psychiatric records stems from the sixth amendment's confrontation clause; from the fourteenth amendment's due process clause, as proposed by four justices of the United States Supreme Court ... or from either the confrontation or due process clause of our state constitution." (citations omitted) Pet. App. 9A, fn. 5. In

Michigan v. Long, supra, this Court stated that it would not review a state court decision which was supported by clearly articulated independent state grounds. Therefore, this Court should deny the petition for certiorari.

D. There is no substantial conflict between state court decisions as to the constitutional basis for disclosure of privileged materials or to the degree of disclosure required.

Petitioner claims that the state courts have inconsistently interpreted and applied this Court's opinion in Ritchie. While acknowledging that at least two courts have adopted Ritchie's due process analysis, State v. Perry, 149 Vt. 623, 548 A.2d 408 (1988), and United States v. Johnson, 537 A.2d 555 (D.C. 1988) petitioner maintains that the Supreme Court of Rhode Island analyzed disclosure of confidential records improperly. State v. Kelly, 554 A.2d 632 (R.I. 1989). Although the Rode Island court failed to apply a due process framework, that court clearly held that its decision was justified on the basis of the state constitutional guarantee to confrontation. id. at 635 and 636. The bottom line, however, is that the Rhode Island court reached the same result as that mandated in Ritchie -- judicial in camera review, not wholesale disclosure to the defendant.

Decisions of other states cited by petitioner like wise fail to establish a compelling reason for the granting of the petition for certiorari. In each of the cases cited by petitioner from Illinois, Maine, Minnesota and Massachusetts, Ritchie is applied to the applicable state statute with the same result, a case by

case, statute by statute analysis.[5] The statutes involved, the specificity of requests made, and the facts of the individual cases are the basis for the different results reached, rather than inconsistent applications of Ritchie.

Petitioner cites a Colorado Supreme Court decision preceeding Ritchie as support for the contention that a confrontational analysis leads to inconsistent results. Petitioner's Brief page 13. People v. District Court, 719 P.2d 722 (Colo. 1986). In two cases subsequent to Ritchie, the Colorado Court fo Appeals has held that absent a sufficient offer of proof and a finding of possible necessity, and absent a waiver, no in camera review of records is required. These cases, decided under statutes unlike Ritchie, are factually distinguishable, and are well within Ritchie's analytical framework. People v. Overton, 759 P.2d 772 (Colo. App. 1988); People v. Exline, 775 P.2d 48 (Colo. App. 1988).

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5 State v. Paradee, the Minnesota Supreme Court ruled that the trial court should examine records in camera, revising the Court of Appeals decision giving the defendant full access to records. This reversal was specifically based on this Court's decision in Ritchie. State v. Paradee, 403 N.W.2d 640, 641 (Minn. 1987). The Maine Supreme Judicial Court agreed that the due process clause and confrontation clause of the state and federal constitutions were conceptually identical and required the same result as that reached in Ritchie. State v. Perry, 552 A.2d 545, 547 (Me. 1989). The Massachusetts Supreme Court uses the materiality standard of Ritchie as the basis for defense access to records following judicial in camera review. Commonweath v. Jones, 404 Mass. 339, 535 N.Ed.2d 331 (1989). In People v. Foggy, analyzing a exception to disclosure was contemplated and where the defense request was merely general, the Supreme Court of Illinois denied an in camera inspection of records.

II. THE CONNECTICUT SUPREME COURT IN STATE v. D'AMBROSIA, DID NOT ESTABLISH A NEW STANDARD OR BURDEN OF PROOF FOR THE PRELIMINARY THRESHOLD SHOWING NECESSARY TO INDUCE THE TRIAL COURT TO INSPECT THE RECORDS IN CAMERA.

This Court in Ritchie ruled that the defendant was entitled to a new trial if on remand the trial court determined that the file to be reviewed contained information that would have changed the outcome of his trial, and if the nondisclosure was not harmless beyond a reasonable doubt. Ritchie at 58. In a footnote, this Court quoted from United States v. Valenzuela v. Bernal, which stated a standard that the unavailable evidence was both favorable and material to the defense. Ritchie at 58 fn. 15, quoting United States v. Valenzuela-Bernal, 458 U.S. 858 (1982). "[The Connecticut Supreme Court in D'Ambrosia does] not read Ritchie or Valenzuela - Bernal to require a defendant to make a greater showing than [its] cases have previously required." D'Ambrosia, at Pet. App. 11A fn. 6.

In focusing its decision on the "predicate inquiry" of whether the respondent was afforded a fair opportunity to make the preliminary showing, the Connecticut Supreme Court emphasized that the witness Knous, whose records were sought, was the state's most vital witness. Had his testimony been either discredited or stricken, the D'Ambrosia court could not be certain that the jury would have returned the same guilty verdicts. Pet. App. 14A. Whether or not the trial court will be required to review the records depends upon a further showing by the defendant. The decision by the Connecticut Supreme Court in no way changes the burden respondent is required to meet to

induce the trial court to inspect the records.

The Connecticut Supreme Court, contrary to the position taken by the petitioner, properly weighed the nature of the two applicable privileges. In requiring that a specific threshold showing be made, the Connecticut Court follows the rulings in Ritchie and Valenzuela-Bernal. In requiring witness' consent prior to in camera review or preliminary questioning, the Connecticut Supreme Court follows the state legislative policy embodied in Conn. Gen. Stat. 52-146e.

CONCLUSION

In this case, the opinion of the Supreme Court of the State of Connecticut was consistent with the decision of this Court in Pennsylvania v. Ritchie and justified on independent and adequate state constitutional grounds. For all the foregoing reasons, the respondent respectfully requests this Court to deny the writ.

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